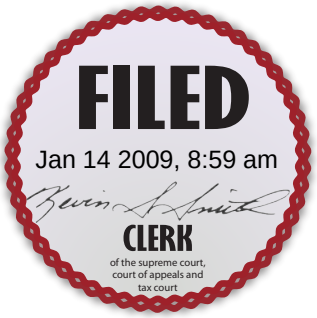

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IN THE
COURT OF APPEALS OF INDIANA

DAVID C. BARTLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0807-CR-374
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable James W. Rieckhoff, Judge
Cause No. 20D05-0712-FD-400

January 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

David C. Bartley appeals his conviction for intimidation as a class D felony.[1] Bartley raises one issue, which we revise and restate as whether the evidence is sufficient to sustain his conviction. We affirm.

The relevant facts follow. On August 8, 2007, T.J. Risor telephoned Bartley and his cousin Karl Miller and asked them to "come down" because he was going "to fight with somebody one-on-one," and he wanted them to "make sure he wasn't going to get jumped." Transcript at 196. Bartley and Miller met Risor at a friend's house, and they took two truckloads of people to a gas station in search of Derek Heign. At some point, Heign drove by the gas station, and they followed him to a park in their trucks.

When Heign arrived at the park to play basketball with friends, the trucks pulled up and ten to fifteen people, including Bartley, emerged armed with baseball bats, wrenches, and tire irons. Only Ryan Spake and Steve Ragsdale, and Bartley's brother Josh Bartley were unarmed. They approached the basketball courts, where Risor confronted Heign, began screaming about "twenty thousand dollars insurance money," apparently under the belief that Heign had previously vandalized his car, and said that he was going to "f****** kill" Heign. Id. at 153. The group encircled Heign, "screaming stuff," and threatening to beat him up. Id. at 154. Heign called the police, and the group dispersed upon the arrival of the police officers.

Middlebury Police Department Officer Aaron Smartt stopped one of the trucks and identified the people inside as Bartley, Gabrielle Bennett, Thomas Bennet, and Karl

[1] Ind. Code § 35-45-2-1 (Supp. 2006).

Miller. Three baseball bats and a wrench were within plain view in the truck. One of the baseball bats belonged to Bartley.

The State charged Bartley with intimidation as a class D felony. At the trial, Karl Miller testified that Bartley, though at the park while Risor was threatening Heign, had walked away to smoke a cigarette. The jury found Bartley guilty as charged. The trial court sentenced Bartley to eighteen months suspended to probation.

The issue is whether the evidence is sufficient to sustain Bartley's conviction. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

The offense of intimidation is governed by Ind. Code § 35-45-2-1, which provides that "[a] person who communicates a threat to another person, with the intent . . . that the other person engage in conduct against the other person's will . . . commits intimidation, a Class A misdemeanor." Ind. Code § 35-45-2-1(a)(1). The offense is a class D felony if

"the threat is to commit a forcible felony." Ind. Code § 35-45-2-1(b)(1)(A). Thus, to convict Bartley of intimidation as a class D felony, the State was required to prove beyond a reasonable doubt that he communicated a threat to commit battery with a deadly weapon with the intent that Heign engage in a fight against his will.[2]

Regarding accomplice liability, Ind. Code § 35-41-2-4 provides that "[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense . . . ." "'[A]n accomplice is criminally responsible for all acts committed by a confederate which are a probable and natural consequence' of their concerted action." McGee v. State, 699 N .E.2d 264, 265 (Ind. 1998) (quoting Vance v. State, 620 N.E.2d 687, 690 (Ind. 1993)). It is not necessary that a defendant participate in every element of a crime to be convicted of that crime under a theory of accomplice liability. Bruno v. State, 774 N.E.2d 880, 882 (Ind. 2002).

In determining whether there was sufficient evidence for purposes of accomplice liability, we consider such factors as: (1) presence at the scene of the crime; (2)

[2] Ind. Code § 35-45-2-1(a)(2) provides that "[a] person who communicates a threat to another person, with the intent . . . that the other person be placed in fear of retaliation for a prior lawful act . . . commits intimidation, a Class A misdemeanor." Although the State charged Bartley under Ind. Code § 35-45-2-1(a)(1), the trial court's jury instructions defining the offense of intimidation recited the elements necessary to convict Bartley under Ind. Code § 35-45-2-1(a)(2), namely, that the jury had to find beyond a reasonable doubt that Bartley placed another person in fear of retaliation for a prior lawful act. See Transcript at 229. However, the trial court also read the charging information to the jury, which alleged that Bartley communicated a threat to commit a forcible felony, "to-wit: battery with a deadly weapon, with the intent that Derek Heign engage in conduct against his will, to-wit: engage in a fight." Id. at 227. The defense also discussed the elements of Ind. Code § 35-45-2-1(a)(1) in its closing arguments. We note also that the preliminary instructions contained the correct subsection of the statute, and the final instructions contained the correct charging information. Accordingly, we find the trial court's error to be harmless, and we need not address Bartley's argument on appeal that the State failed to prove that Heign was placed in fear of retaliation for a prior lawful act. See Appellant's Brief at 13.

companionship with another at the scene of the crime; (3) failure to oppose commission of the crime; and (4) course of conduct before, during, and after occurrence of the crime. Id. Although they may be considered as evidence of accomplice liability, mere presence at the scene and failure to oppose the commission of the crime are insufficient to support a conviction under such a theory. Turner v. State, 755 N.E.2d 194, 198 (Ind. Ct. App. 2001), trans. denied. Instead, evidence must exist of "the defendant's affirmative conduct, either in the form of acts or words, from which an inference of common design or purpose to effect the commission of a crime may be reasonably drawn." Id.

The State presented evidence that Bartley accompanied Risor and others in search of Heign because Risor wanted to fight Heign. Bartley brought his baseball bat with him. At the basketball courts, a group of people armed with baseball bats, wrenches, and tire irons surrounded Heign. Witnesses testified at trial that, of the people who had arrived by truck to help Risor, only Ryan Spake and Steve Ragsdale, and Bartley's brother Josh Bartley were unarmed. As a group, they screamed at Heign and threatened him, and Risor threatened to kill him.

In support of his argument that the evidence is insufficient, Bartley cites Miller's testimony that Bartley, though at the park, had walked away to smoke a cigarette while Risor was threatening Heign. He also notes that Heign was unable to identify Bartley as one of the armed group. However, the State produced witnesses who testified that all of the people who had arrived by truck approached and threatened Heign and that none of them walked away to smoke a cigarette. Moreover, it is undisputed that Bartley was a

member of this group. Bartley merely asks that we reweigh the evidence and judge the credibility of witnesses, which we cannot do.

Given the facts of the case, we conclude that the State presented evidence of probative value from which a reasonable trier of fact could have found Bartley guilty beyond a reasonable doubt of intimidation as a class D felony under a theory of accomplice liability.

For the foregoing reasons, we affirm Barley's conviction for intimidation as a class D felony.

Affirmed.

ROBB, J. and CRONE, J. concur